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UNCLAS SECTION 01 OF 06 KYIV 000404

SIPDIS

SENSITIVE
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STATE FOR EB/TPP/IPE - JBOGER/JURBAN
STATE PLEASE PASS TO USTR FOR PBURKHEAD/JGROVES
USDOC FOR ITA/MAC/OIPR - CPETERS
USDOC FOR 4231/ITA/OEENIS/NISD - CLUCYCK
COMMERCE PLEASE PASS TO USPTO AND CLDP

E.O. 12958: DECL: N/A
TAGS: ETRD KIPR ECON UP
SUBJECT: UKRAINE IPR: 2008 SPECIAL 301 -- POST INPUT

REFS: A) STATE 9475
B) 2007 KYIV 2865
C) 2007 KYIV 2385
D) 2007 KYIV 2260
E) 2007 KYIV 1888
F) 2007 KYIV 1452
G) 2007 KYIV 1450
H) 2007 STATE 154669
I) 2007 STATE 55928
J) 2007 KYIV 1417
K) 2007 KYIV 1205
L) 2007 KYIV 348
M) 2005 KIEV 4872

SENSITIVE BUT UNCLASSIFIED; NOT FOR INTERNET PUBLICATION.

¶11. (SBU) Summary and Recommendation: Embassy recommends Ukraine remain on the Special 301 Priority Watch List, which is statutorily accompanied by Section 306 monitoring (ref A), although the Government of Ukraine continues to move in the right direction on Intellectual Property Rights (IPR) protection. Embassy also recommends that the USG develop a roadmap with the GOU for progress on one or more troublesome issues, such as the notorious Petrivka open air market in Kyiv.

¶12. (SBU) The GOU has substantially improved its enforcement of IPR in recent years, in part to meet the requirements for accession to the World Trade Organization. Ukraine's IPR-related legal base has significantly improved and is now almost fully in compliance with TRIPS and other international norms. Law enforcement bodies have also stepped up efforts to seize IPR-infringing goods and to prosecute those involved in their trade. Perhaps most importantly, illegal production of pirated and counterfeit goods has been halted almost completely. The GOU still faces serious IPR enforcement problems, however. Pirated optical discs and counterfeit goods remain widely available, particularly in large open-air markets throughout the country's larger cities; the Petrivka market in Kyiv is the most notorious. Industry reps estimate piracy levels for music and video at 60%, and for computer software at 84%. The transshipment of pirated and counterfeit goods, particularly optical discs produced in Russia, is a major challenge for Customs officials. The GOU has been slow to respond to the growing threat of internet piracy, and government procurement/use of

unlicensed software remains a problem. Courts continue to hand down lax sentences for IPR infringers. End Summary and Recommendation.

Optical Media Piracy

¶13. (U) Ukraine now has one of the most comprehensive optical media laws in the world, regulating nearly every step in the life of an optical disc (OD). The 2002 OD law put into place a detailed regulatory regime, outlining a special OD plant licensing regime, plant inspection procedures, and measures to be taken when violations are discovered. A crucial package of amendments to the 2002 law and the Criminal Code of Ukraine, passed in the Rada (parliament) in July 2005, improved inspection procedures and increased the penalties that apply to violations. The amendments also removed a requirement that imported ODs have Source Identification (SID) codes imprinted on them.

¶14. (SBU) Ukraine is no longer a major source of pirated optical media. Alexander Kotlyarevsky, IFPI Deputy Regional Coordinator for the CIS, told Econoff on February 11 that the IFPI's forensic specialists have not detected any pirated discs believed to be manufactured in Ukraine since the 2005 amendments to the OD law. (Note: As a sign of progress in recent years, IFPI decided to close its representative office in Ukraine in 2007 and is now working through domestic music industry organizations. End Note.) The State Department for Intellectual Property (SDIP) coordinates inspections of the seven OD plants operating in Ukraine, and GOU officials reported that they did not

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detect any signs of pirate production during their inspections in 2007. Serhiy Lebid, Deputy Head of the Internal Affairs Ministry's Economic Crimes Department, told Econoff on February 15 that the vast majority of pirated ODs in Ukraine come from Russia and that GOU investigators have uncovered major shipping routes, particularly by rail, originating in Russia.

¶15. (SBU) The hologram sticker program (ref M) remains the primary method used by law enforcement to recognize potentially pirated materials. Industry reps have complained about the functioning of this program. They say the procedures for acquiring stickers are time-consuming and bureaucratic hurdles, and they claim that some importers of pirated discs are able to obtain the hologram stickers. Counterfeit hologram stickers are also a problem. GOU officials recognize these problems but argue that eliminating the program altogether would be a mistake. Article 203 of the Criminal Code provides law enforcement officials with some "ex officio" powers when they encounter suspected pirated products without a hologram sticker. Eliminating the hologram program could therefore serve to reduce law enforcement's authority to seize suspected pirated material, they argue.

International Obligations and TRIPS Compliance

International Agreements

¶16. (U) Ukraine is a member of the Universal Copyright Convention, the Convention establishing the World Intellectual Property Organization (WIPO), the Paris Convention, the Madrid Agreement, the Patent Cooperation Treaty, the International Convention for the Protection of New Varieties of Plants, the Berne Convention, the Geneva Phonograms Convention, the Trademark Law Treaty, and the Budapest Treaty. Ukraine is a party to the 1996 WIPO Copyright Treaty (WCT), the WIPO Performances and

Phonograms Treaty (WPPT), and the Rome Convention.

Recent Legislative Improvements

¶7. (U) While working toward WTO accession, Ukraine's legal base has achieved substantial TRIPS compliance. TRIPS omnibus legislation passed in 2002 was a major step, and the Rada passed a number of IPR-related laws in November 2006. An amendment to the Customs Code granted customs officials expanded "ex officio" rights to stop pirated material from entering Ukraine and helped bring the Code into compliance with Article 58 of the TRIPS Agreement. The Rada passed two laws related to data protection in order to comply with Article 39.3 of TRIPS (see below). Finally, the Rada also passed an amendment to the law "On Protection of Rights for Indications of Origin of Goods," and the GOU plans to introduce a second amendment in order to bring Ukraine's geographical indications (GIs) legislation into full TRIPS compliance. In May 2007, the Rada passed amendments to the Civil and Criminal Codes to give the GOU authority to destroy counterfeit goods, although the GOU still lacks the technical capability to make full use of this authority (ref G). (Note: The GOU already had the authority and capability to destroy pirated ODs. End Note.)

Collective Management Problems

¶8. (SBU) Ukraine's system of collective management functions imperfectly. Rights holders have complained bitterly that some royalty collecting societies collect fees for public use of copyrighted material without authorization and do not properly return royalty payments to rights holders (ref D and previous). The music industry reports that only about 5-7% of the market is properly paying performance royalties. SDIP's initial draft amendment to the Copyright Law failed to address industry's

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concerns on royalty collecting societies, but the draft is now being reworked. (Note: The GOU has promised to provide the USG a copy of the draft law for comment once it is finalized, but before it goes forward in the Rada. End note.) Legitimate rights holders have had opportunities to express their views to the GOU via the U.S.-Ukraine Enforcement Cooperation Group, the EU-Ukraine IP Dialogue, and GOU-hosted public events. SDIP's revocation of the license of collecting society Oberih in 2007 (ref L) was welcomed by music industry representatives who claimed Oberih illegitimately collected fees.

Data Protection

¶9. (U) Ukraine has improved its protection of undisclosed test data, such as that from drug trials, from unfair commercial use (TRIPS Article 39.3). In November 2006, the Rada passed amendments to the law "On Medicinal Drugs," introducing a five-year period for the protection of undisclosed information in the course of registration of medical drugs, and to the law "On Pesticides and Agrochemicals," introducing a ten-year protection period for agricultural chemical products. The Association of Pharmaceutical Research and Development (APRaD), which unites local representatives of large international pharmaceutical companies, has said it is generally satisfied with the new law but industry reps continue to complain of a lack of transparency by GOU bodies responsible for granting market approval for generic drugs. These concerns were the focus of a November 2007 meeting of the U.S.-Ukraine IPR Enforcement Cooperation Group (ref B).

Counterfeit Goods

¶10. (U) Counterfeit goods, including products that contain protected trademarks, remain readily available in Ukraine. Counterfeit apparel products are particularly common. Most counterfeit goods are not produced in Ukraine, but are imported. Volodymyr Dmytryshyn, Deputy Chairman of SDIP, told attendees of a conference on February 19 that the GOU believed most counterfeit products, especially apparel, were imported from China, with counterfeit pharmaceuticals coming more from India, and IPR-infringing food products -- from Turkey.

Use/Procurement of Government Software

¶11. (SBU) In March 2004, the GOU launched a campaign to phase out illegal software at government agencies through annual inventories, and the GOU subsequently signed a software legalization agreement with Microsoft in June 2005. Microsoft cancelled this agreement in June 2006, however, as the GOU had taken little to no action to implement it. Industry estimates put the piracy level for government software at 75%, down slightly from 78% in 2006. Daniil Klyuchnikov, Anti-Piracy Manager for Microsoft Ukraine, told Econoff on February 11 that the GOU had thus far failed to demonstrate the political will necessary to tackle the problem, but that Microsoft was hoping to reengage with the government soon. The Business Software Alliance (BSA) established a presence in Ukraine in February to expand its anti-piracy efforts.

Enforcement

Seizures/Prosecutions Increasing

¶12. (U) SDIP and the Ministry of Internal Affairs are steadily improving enforcement. Statistics for 2007 show a continuing, dramatic increase in IPR cases filed and in seizures. The Ministry of Internal Affairs reported that there were 1,058 IPR-related criminal investigations in

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2007, up 30% from 2006. 635 cases went to the courts (up 37% from 2006) and 186 led to convictions (up 62% from 2006). Law enforcement officials have credited the February 2006 Criminal Code amendments for the improved figures. The 2006 amendments significantly lowered the required threshold (from roughly 5,200 USD to 700 USD) needed to pursue criminal prosecution and increased penalties, including up to seven years imprisonment for major offenders. The number of IPR-related administrative offenses has also continued to grow and stood at 6,709 for 2007. According to official statistics, in 2007 the GOU seized a total of 1.4 million pirated audio/visual items (mostly optical discs), worth an estimated 5.4 million USD and up slightly from 1.3 million items in 2006. In 2007 the GOU also seized an estimated 1.4 million USD worth of counterfeit and trademark-infringing goods.

¶13. (U) SDIP is responsible for coordinating all IPR protection efforts, and in 2005 agreed to form an Enforcement Cooperation Group (ECG) jointly with the United States and with rights holders. The ECG met three times in 2007 (refs B, G, and L). (Note: The GOU also conducts a biannual IP Dialogue with the European Union. End note.) SDIP has just one state inspector per oblast and must enlist the assistance of the Internal Affairs Ministry to file criminal cases.

Courts Still a Problem

¶14. (SBU) The Ministry of Internal Affairs complains that too many IPR cases result only in small fines, ranging from 1700-3400 UAH (340-680 USD) for criminal cases. The average fine for administrative cases in 2007 was only 250 UAH (50 USD). For all criminal convictions in 2007, the courts penalized 27% of violators with fines and 20% with "correctional works," which usually consists of paying 20% of one's salary for one to five years. In 53% of cases, the courts decided on "imprisonment" but with delayed sentencing, similar to probation in the U.S. system. No one has yet to serve jail time in Ukraine for IPR crimes. Viktor Moskalenko, Deputy Chairman of the High Commercial Court, and Mykola Baliuk, Judge of the Supreme Court, have separately told Econoff that some judges, particularly in the regions, lack expertise on IPR issues and do not always take IPR crimes seriously. (Note: Post has expanded efforts to provide IPR training to the judiciary. Forty judges have participated in USG-sponsored IPR training seminars held in Ukraine since the beginning of 2007 (ref F), and another five have traveled, or will soon travel, to Washington for training at USPTO's Global Intellectual Property Academy. Post intends to continue these efforts, largely thanks to INL's IPR Enforcement Training Funds Program (refs H-J). End note.)

¶15. (SBU) The Ministry of Internal Affairs had requested in 2006 that the Supreme Court hold a coordination session on IPR crimes to issue clearer guidelines to the lower courts, but this session did not yet take place. Baliuk told attendees of a USG-sponsored seminar on February 13 that the Supreme Court was planning to issue a resolution on IPR as part of its upcoming Plenary Session to help clarify some procedural questions.

¶16. (SBU) In what at the time appeared to be a major step forward, in September 2007 local record company Honest Music won a landmark civil court case against the owners of the internet site www.mp3.ua, considered the largest Ukrainian source of pirated music online (ref C). The ruling forced mp3.ua to pull all of the tracks from Honest Music's catalogue off of the download site and to pay damages. The site owners twice appealed, however, and in February the initial decision against mp3.ua was overturned on the grounds that Honest Music was unable to prove itself the rights holder of the music in digital format. (Note: See below for more on internet piracy. End note.) Vadim Koktysh, Director of Honest Music, told Econoff on February 19 that he strongly suspected a bribe had been paid to obtain this court decision, and that a Member of Parliament with ties to mp3.ua had personally intervened on behalf of

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the site's owners.

Customs

¶17. (U) Amendments to the Customs Code made in 2004 empowered customs officers to impound illegal material at the border, but only if it was included in the "Register of Goods Containing Intellectual Property." Customs officials had also needed to refer impounded goods to the courts for an official determination as to whether they are counterfeit or not. A November 2006 amendment to the Customs Code, however, granted expanded "ex officio" powers, allowing customs officials to act on their own initiative without a right holder's claim or court decision. The State Customs Service has a separate division focusing on IPR enforcement and has established special IPR subdivisions at ports of entry and inland customs points.

Notorious Markets - Petrivka

¶18. (SBU) Pirated and counterfeit products remain brazenly available at outdoor, open air markets that exist in many of Ukraine's larger cities. Kyiv's Petrivka Market, a massive open air market where as many as 300 stands may be selling illegal material at any given time, has become a symbol of piracy in Ukraine (ref E). Although Ukrainian law enforcement has pushed most of the smaller vendors off street corners, Petrivka remains a sanctuary for all kinds of illegal, pirated goods, including music, films, games, and software. In 2005, the GOU undertook "Operation Intellect," an enforcement action meant to drive the pirates out of Petrivka. The impact of Operation Intellect and subsequent enforcement actions, including stepped-up raids before this year's New Year and Christmas holidays, has only been temporary, however. One barrier to enforcement, according to industry sources, is that the owners of pirate stalls are often influential businessmen with ties to local government. Law enforcement officials may be wary to undertake major operations against Petrivka without clear directives from the highest levels of the Government.

Internet Piracy

¶19. (U) Internet piracy is a nascent and growing problem in Ukraine. Many Ukraine-based websites offer pirated material for download with the full knowledge of their Internet Service Providers (ISPs). Industry groups estimate that out of the roughly 400 ISPs in Ukraine, 150 of them support websites offering pirated material. Microsoft has also complained that Local Area Networks (LAN), some of which cover entire Ukrainian cities, allow for widespread software piracy (ref K). Another common type of Internet piracy is on-line mail order sites.

¶20. (SBU) Ministry of Internal Affairs officials have pointed to some successes in stopping the mail order piracy, but admit that file sharing/downloading is much more difficult (ref E). GOU representatives have argued that Ukrainian law does not give law enforcement officials clear authority to shut down websites, although sometimes ISPs can be persuaded to do so. Yuriy Shafray, Head of the Ministry of Internal Affairs' IPR Division, told us on February 14 that law enforcement had succeeded in shutting down some 43 pirate sites in 2007 by working informally with ISPs. (Comment: Because they were shut down without going through the courts, however, many of these sites may have reappeared on a new ISP or in a modified format. End Comment.) No criminal cases involving file downloading went to court in 2007, although the Interior Ministry's Lebid told Econoff on February 15 that the GOU does plan to bring one or two cases in the near future. At a meeting of the IPR Enforcement Cooperation Group in February 2007, industry and SDIP agreed to begin jointly monitoring

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suspected pirate sites (ref L).

Comment: Pushing for a Breakthrough

¶21. (SBU) In terms of IPR enforcement, the situation in Ukraine today is hardly recognizable from that which existed only a few years back. The GOU has shut down illegal production and has a corps of devoted professionals across several agencies working to improve enforcement. If the GOU can make progress on some of the most troublesome outstanding issues -- open air markets, transhipment, internet piracy, and government software -- it will be time to consider dropping Ukraine from the Priority Watch List. Post recommends that Washington consider developing a roadmap with the GOU on one or more

of these issues to encourage a breakthrough. Tackling the open air markets, perhaps at first focusing exclusively on the notorious Petrivka market, might be the most appropriate subject for such a roadmap, as the USG has already done something similar for neighbouring countries. Post will work with Washington to draft a road map proposal septel. End comment.

TAYLOR